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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JACK HENRY LEWIS, JR.,

Defendant and Appellant.

D054025

(Super. Ct. No. SCD193558)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed.

This murder and torture case arose out of the death by strangulation of Jan Hasegawa at the hands of defendant Jack Henry Lewis, Jr., with whom she was in a relationship that was (as Lewis acknowledges) marked by domestic violence, methamphetamine use, and "methamphetamine-fueled 'hypersexuality.'" Before trial, the court denied a defense motion seeking separate juries for the guilt phase and any penalty phase based on studies showing that a "death-qualified" jury is more prone to convict a defendant in a capital case than a jury that has not been death qualified. The court

precluded two experts from testifying to their opinions as to whether the forensic evidence was inconsistent with the infliction of torture. As shown by his trial testimony, Lewis's principal defense was that, although he was responsible for Hasegawa's death, he did not intend to kill or torture her.

In the guilt phase of the trial, the jury convicted Lewis of first degree murder (count 1: Pen. Code,¹ §§ 187, subd. (a) (hereafter § 187(a)) & 189) and found true the count 1 torture-murder special circumstance allegation that Hasegawa's murder was intentional and involved the infliction of torture within the meaning of section 190.2, subd. (a)(18) (hereafter section 190.2(a)(18)). The jury also convicted Lewis of torture (count 2: § 206).

In the penalty phase of the trial, the jury returned a verdict determining Lewis's punishment in this capital case to be life without the possibility of parole. The court sentenced Lewis on count 1 to life without the possibility of parole. On count 2, the court imposed a life sentence and stayed the sentence under section 654.

Lewis appeals, contending (1) his convictions of counts 1 and 2 and the true finding on count 1 that Hasegawa's murder was intentional and involved the infliction of torture must be reversed because the evidence was insufficient to prove he acted with the intent to torture; (2) the convictions must be reversed because the court prejudicially erred and infringed upon his Fourteenth Amendment right to present a defense when it precluded two forensic experts from rendering opinions on whether the crime scene and

¹ All further statutory references are to the Penal Code unless otherwise specified.

the victim's condition were inconsistent with torture; (3) the court erred in denying his motion for separate guilt-phase and penalty-phase juries because (a) it did not understand the scope of its discretion with respect to the motion, and (b) defense in limine evidence from a Capital Jury Project research expert, showing that "death-qualified" jurors are biased toward conviction during the guilt phase of trial, constituted "good cause" within the meaning of section 190.4, subdivision (c) (hereafter section 190.4(c)) for a separate, "non-death-qualified" jury for the guilt phase; and (4) the cumulative and synergistic effect of the court's errors asserted in the foregoing second and third claims infringed upon his Fourteenth Amendment due process right to a fair trial.

We conclude that (1) substantial evidence supports Lewis's convictions on counts 1 and 2 and the true finding on the count 1 special circumstance allegation; (2) the court did not abuse its discretion by excluding the opinion testimony of the forensic experts; (3) the court committed harmless error in denying without prejudice his in limine motion for separate guilt-phase and penalty-phase juries on the ground the motion was premature; and (4) his claim of cumulative error is unavailing. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND

A. The People's Case

On the night of September 7, 2005, Hasegawa returned after work to the apartment she shared with Lewis. Hasegawa was scheduled to work the next day, but she never arrived.

At around 1:30 a.m. on September 8, a neighbor heard a woman screaming "Stop! No! Don't!" The yelling lasted for about 15 to 30 minutes.

At around 11:20 a.m. that same day (September 8), Lewis called 911 and told the operator to send an ambulance to his apartment. When police arrived at the apartment, they found Hasegawa dead in the bedroom. The officers observed circular injuries all over Hasegawa's body from the shoulders on down. They noticed some of her hair was missing and found hair in the bedroom, dining room, hallway, and other places in the apartment. Fecal matter stains were found on the walls, carpet, and elsewhere in the apartment.

On the bed, the police found a flashlight that had a stripe of feces around the middle. The location of the feces was consistent with someone having feces in the web of his hand and grabbing the flashlight at that point. DNA testing confirmed that the feces around the flashlight was Lewis's.

At around midnight on September 8, Lewis showed up at Debbie Faremouth's house, where her friend Jacqueline Leigh was visiting her. Lewis was visibly upset and agitated, and he was "high" on something. He told the women he had beaten his girlfriend and he thought he hurt her very badly. He described beating Hasegawa with his fists and specifically mentioned hitting her all over her body and in the head. Lewis told them he beat Hasegawa because she would not perform oral sex on him. He said, "She wouldn't give me a blow job. For 13 years I was giving her oral sex, and she would not do this for me, for 13 years."

Early in the morning on September 9, 2005, Lewis visited his friend Jimmy Brown. Lewis told Brown he had a fight with Hasegawa, and he beat her and thought he may have killed her. Lewis said he "beat the hell out of her."

The next day, September 10, Lewis turned himself in to the police.

Claire Nelli, a registered nurse and a certified sexual assault examiner, performed a postmortem examination of Hasegawa. Nelli observed that Hasegawa's entire genitalia and her inner upper thighs were bruised. Hasegawa's had a large laceration and abrasions to her labia, an external laceration to her anus, and several abrasions and bruising inside her anus.

Dr. Glenn Wagner, the chief medical examiner for San Diego County, performed the autopsy on Hasegawa on September 9. He observed significant bruising on Hasegawa's body. The vast majority of the bruises appeared to be from new injuries inflicted on top of other new injuries. Hasegawa had bruising to the head and scalp, around the nose and lips, and under the chin. She had more intensive bruising on the neck. The bruising continued down her right arm to her forearm and to the base of her thumb. Her left arm was bruised on the elbow.

Dr. Wagner observed bruising in a splotchy pattern from her collarbone down, concentrated below the left breast and slightly to the left of the chest bone and extending into the abdomen. Hasegawa's perineal area, below her buttocks extending to the inside of the legs and the genitalia, was discolored due to hemorrhaging or bruising.

Dr. Wagner found curvilinear bruises and lacerations inside Hasegawa's rectum and vaginal vault. The bruises continued down her right leg to her knee, calf muscle,

shin, ankle and foot. Her left leg was covered with mostly oval or round bruises down to her knee and foot. There was a footprint bruise below Hasegawa's left arm extending to her upper back and bruising to her lower back. The bruising to her face covered an area measuring seven by six inches, and the bruising to her scalp nearly covered her whole head. Her right ear had bruising extending into the cartilage of the ear, known to boxers as "cauliflower ear."

When asked how many bruises were on Hasegawa's body, Dr. Wagner answered, "I did count and got exhausted." The chest area alone had up to 57 bruises. Hasegawa sustained a total of over 100 bruises.

Dr. Wagner opined that many of the circular bruises were consistent with having been inflicted by the light-end of the large police-type flashlight found on the bed in the apartment. Similarly, the curvilinear abrasions and lacerations to Hasegawa's vagina and rectum were consistent with having been inflicted with the flashlight. Dr. Wagner believed the smaller circular bruises to Hasegawa's lower legs and feet were caused by fingers or knuckles, and the footprint bruise to her chest and back appeared to have been caused by someone pressing his foot down on her chest or stepping on her.

Dr. Wagner also opined that the absence of pattern marks in the bruising to the head suggested that those bruises were caused by repeated blows with a hand or foot, which was consistent with Hasegawa being repeatedly punched in the head. He found this conclusion was supported by the excessive amount of blood under Hasegawa's scalp, which was swollen to a thickness of between one-half and three-quarters of an inch, and which was consistent with multiple impacts over a period of time.

Dr. Wagner further opined that the circular bruises to Hasegawa's abdomen, legs, and left arm were caused by the flashlight, while the bruising to the inside of her thighs was consistent with hands holding her legs open. The handprints on her thighs indicated a struggle or movement by the victim and the perpetrator. The bruises to the bottom of her feet were consistent with the flashlight being used to strike the feet. The bruises to her spine were likely caused by repeated punching or kicking. The extensive bruising to the backs of Hasegawa's hands was consistent with defensive injuries.

The area of hair loss on the back of Hasegawa's head measured four inches by four inches. Dr. Wagner found air in Hasegawa's abdomen, which was consistent with her gasping for breath between repeated blows to her stomach.

Dr. Wagner testified that Hasegawa suffered multiple bone fractures. Her left wrist was fractured, and her left elbow was bruised. She suffered four fresh rib fractures, which indicated repeated blows to her side.

Dr. Wagner opined that strangulation was the cause of Hasegawa's death. The injuries to Hasegawa's neck and throat were consistent with manual strangulation. An abrasion to her neck was consistent with her using her hands to try to remove Lewis's hands from her neck. Additional friction abrasions on her neck indicated a struggle. Manual strangulation typically requires an estimated two-plus minutes of sustained pressure around the neck. If the pressure is released, the time starts over again and requires another two-plus minutes. Dr. Wagner stated he found significant bleeding inside Hasegawa's neck, and the bruising to the outside of her neck showed multiple hand positions.

Dr. Wagner also opined that Hasegawa's injuries would have been painful. Specifically, he stated the bruising to her abdomen would have been painful. She was hit with enough force to bruise her lungs, which would have been painful. She would have suffered pain from the broken ribs and wrist.

Dr. Wagner believed that the bruises caused Hasegawa to go into shock, which occurs when a person loses 30 to 40 percent of their blood. Blood had left Hasegawa's arteries and veins and was in her muscles and tissues.

Dr. Wagner uses rigor mortis, body temperature and lividity to estimate time of death. He opined that the time of Hasegawa's death was between 8:00 and 11:00 a.m. on September 8. Dr. Wagner also stated that Hasegawa "took a hell of a beating."

Prior Abuse

On August 2, 2003, Hasegawa went to the Pomerado Hospital emergency room with a broken right arm and reported she had slipped in the shower.

On October 10 of that year, Hasegawa called her physician, Dr. Carol Cornelius, and requested counseling, telling her that Lewis had abused her. Hasegawa described the abuse as kicking, choking, pulling her hair, pushing her into a wall, and breaking her arm when she threatened to leave him.

On October 20, 2003, Lewis also met with Dr. Cornelius and admitted physically abusing Hasegawa and breaking her arm in August of that year. Dr. Cornelius referred him for counseling.

Two days later, on October 22, Hasegawa again went to Dr. Cornelius's office and reported multiple episodes of abuse, including, most recently, Lewis head-butting her

forehead. She also reported that Lewis picked her up by the neck and pulled her hair several times, slapped her vagina and, when she held her hand there to protect herself, bent her left arm backwards, causing pain in her hand and fingers. Hasegawa again reported that Lewis had broken her arm in August when she threatened to leave him. Hasegawa prepared and gave to Dr. Cornelius a list that documented Lewis's abuse. The list was added to Hasegawa's medical file and was introduced at trial.

Hasegawa told her therapist, Diane Bristol, that Lewis forced her to have sex after he injected her with drugs. Hasegawa indicated Lewis injected her because sex would be more pleasurable for him.

In May 2004 Hasegawa and Lewis went over to her parents' house. One of Hasegawa's brothers noticed that her face was bloody and asked both Lewis and Hasegawa about it. Hasegawa explained that Lewis had picked at the zits on her face until it hurt. She screamed at him to stop because he was hurting her, but he refused to stop. Lewis admitted he had continued to pick at her zits even after she told him it hurt and he needed to stop.

In July 2005 Hasegawa arrived at work with clumps of hair missing, a swollen cheek, and bruising to the side of her face. Hasegawa told her coworker, Tina Rasmussen, that Lewis had hit her and she was scared.

B. The Defense

Frederic Poirier indicated he was asleep in his apartment, which was next to Lewis's, the night of September 7 and 8, 2005. He did not hear anything that night.

Brent Turvey, a forensic scientist and criminal profiler, opined that it is not reasonable to assume that all of Hasegawa's injuries, as described in the autopsy report, were associated directly with the homicide. He also opined that all of the injuries could have been inflicted within 10 to 15 minutes; the injuries related to the flashlight were due to "rough sex," rather than a fight; Lewis did not try to remove any connection between himself and the scene of the homicide; and the homicide itself showed no evidence of planning and indicated a "spur of the moment intense rage type of incident."

Lewis testified. He started using methamphetamine to treat pain from a back surgery, and he and Hasegawa used it before sex. Hasegawa introduced pornography, anal sex, and choking into their sex life, and their sexual activity became increasingly rough. Lewis stated he was responsible for Hasegawa's death, but he did not intend to kill or torture her.

Lewis stated the evening of the incident began when Hasegawa came home from work and they injected methamphetamine. They engaged in sexual activity, which included inserting the flashlight into Hasegawa's rectum and vagina, and into his anus. He injected a second dose of methamphetamine and engaged in additional sexual behavior, but he did not recall ever hitting Hasegawa. He did remember performing CPR and hearing her ribs break.

Dr. Steven Shoptaw, a professor of family medicine and psychiatry at UCLA and Lewis's methamphetamine addiction expert, indicated that a 2002 research study suggested that women methamphetamine users tended to engage in "exaggerate[d] sexual behaviors," including unprotected and anal sex, and sex with more partners. He stated

that one of the major reasons for relapse into methamphetamine use "is the type of sex that you have while you're under the influence of methamphetamine is fundamentally impossible when you're not under the influence." He also stated that one of the triggers to relapse is "just the boredom that happens with returning to vanilla sex and the whole longing for that . . . more extreme form of sex."

Dr. Alex Stalcup, a specialist in addiction medicine, testified he believed Lewis suffered from methamphetamine addiction, including out-of-control use and inability to see the full impact of his behavior. He also diagnosed Lewis as suffering toxic psychosis, a severe mental illness, and stated that injection by a partner was the norm for women methamphetamine injectors.

Dr. Daryl Matthews, a forensic psychiatrist, opined that Lewis suffered chronic methamphetamine psychosis and was intoxicated, but was not in a delirium, at the time of Hasegawa's killing.

DISCUSSION

I. *SUFFICIENCY OF THE EVIDENCE*

Lewis first contends his conviction of count 1 (first degree murder by torture: §§ 187(a)² & 189), the true finding on the count 1 torture-murder special circumstance allegation that Hasegawa's murder was intentional and involved the infliction of torture (§ 190.2(a)(18)), and his conviction of count 2 (torture: § 206) all must be reversed

² Section 187(a) provides: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

because the evidence was insufficient to prove he acted with the intent to torture. We reject this contention as substantial evidence supports both convictions and the torture-murder special circumstance finding.

A. Applicable Legal Principles

1. Torture murder (count 1)

A murder perpetrated by means of torture (hereafter referred to as torture murder) is murder of the first degree. (§ 189.)³

However, since section 189 does not define the crime of torture murder, the California Supreme Court, as a matter of statutory construction, has defined torture murder as "murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*People v. Steger* (1976) 16 Cal.3d 539, 546; *People v. Elliot* (2005) 37 Cal.4th 453, 466 (*Elliot*); see also *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204 (*Aguilar*).) Our high state court has also explained that the "culpable intent" required for a conviction of torture murder is the intent " ' "to cause pain for ' "the purpose of revenge, extortion, persuasion or for any other sadistic

³ Section 189 provides in part: "All murder which is perpetrated by means of . . . *torture* . . . is murder of the first degree." (Italics added.)

purpose." ' ' ' ' (Elliot, *supra*, 37 Cal.4th at p. 466; *People v. Cole* (2004) 33 Cal.4th 1158, 1207 (*Cole*); see also CALCRIM No. 521.⁴)

For the purpose of proving murder by torture, the intent to inflict extreme pain may be inferred from (1) the circumstances of the crime, (2) the nature of the killing, and (3) the condition of the victim's body. (*Elliot, supra*, 37 Cal.4th at p. 467.) However, the Supreme Court has " ' "cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an 'explosion of violence,' as with the intent to inflict cruel suffering." ' ' " (*Ibid.*)

2. Torture-murder special circumstance (count 1)

First degree murder is punishable by death or imprisonment in state prison for life without the possibility of parole if the murder "was intentional and involved the infliction of torture." (§ 190.2(a)(18);⁵ *People v. Mungia* (2008) 44 Cal.4th 1101, 1136 (*Mungia*).)

⁴ CALCRIM No. 521, as given to the jury in this case, states: "The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if: [¶] 1. He *willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain* on the person killed while that person was still alive; [¶] 2. He *intended to inflict such pain* on the person killed *for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason*; [¶] 3. The acts causing death involved a high degree of probability of death; [¶] AND [¶] 4. The torture was a cause of death." (Italics added.)

⁵ Section 190.2(a)(18) provides: "(a) The penalty for a defendant who is found guilty of murder in the first degree is *death or imprisonment in the state prison for life without the possibility of parole* if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] . . . [¶](18) The murder was intentional and involved the infliction of *torture*." (Italics added.)

However, "[t]he language of [section 190.2(a)(18)] does not expressly define what is meant by 'the infliction of torture.' " (*Elliot, supra*, 37 Cal.4th at p. 478.)

In *Mungia*, our high state court held that this section 190.2(a)(18) "torture-murder special circumstance" requires proof that a defendant "intentionally performed acts that were calculated to cause extreme physical pain to the victim." (*Mungia, supra*, 44 Cal.4th at p. 1136.) Specifically, *Mungia* explained, the intent required for a true finding on a torture-murder special circumstance allegation is " 'an intent to cause *cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose.*' " (*Ibid.*, italics added; *Elliot, supra*, 37 Cal.4th at pp. 478-479.) For an intentional murder to involve "the infliction of torture" under section 190.2(a)(18), a premeditated intent to inflict prolonged pain is not required. (*Elliot, supra*, 37 Cal.4th at p. 479.)

Mungia also explained that for purposes of section 190.2(a)(18) "[t]he intent to torture 'is a state of mind which, unless established by the defendant's own statements (or by another witness's description of a defendant's behavior in committing the offenses), must be proved by the circumstances surrounding the commission of the offense [citations], which include the nature and severity of the victim's wounds.' " (*Mungia, supra*, 44 Cal.4th at p. 1137, italics omitted.)

3. Torture (count 2)

The crime of torture is defined by section 206, which provides:

"Every person who, with the *intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose*, inflicts great bodily injury as defined in

Section 12022.7 upon the person of another, is guilty of torture. [¶]
The crime of torture does not require any proof that the victim
suffered pain." (Italics added.)

In *People v. Pre* (2004) 117 Cal.App.4th 413, 419 (*Pre*), this court explained that,
" '[a]s [section 206] states, torture has two elements: (1) a person inflicted great bodily
injury upon the person of another, and (2) the person inflicting the injury did so with
specific intent to cause *cruel and extreme pain and suffering for the purpose of revenge,
extortion, persuasion, or for any sadistic purpose.*' " (Italics added.) "The statutory
requirement of an intent to inflict 'cruel' pain and suffering has been interpreted to require
that the defendant had an intent to inflict extreme or severe pain." (*Id.* at p. 420, citing
Aguilar, supra, 58 Cal.App.4th at p. 1202.) The statutory term "sadistic purpose" means
" ' "the infliction of pain on another person for the purpose of experiencing pleasure." ' "
(*Pre* at p. 420, quoting *Aguilar* at p. 1203.)

Thus, a conviction of torture (§ 206) and a true finding on a torture-murder special
circumstance allegation (§ 190.2(a)(18)) both require proof that the defendant acted with
a specific intent " 'to cause *cruel and extreme pain and suffering for the purpose of
revenge, extortion, persuasion, or for any sadistic purpose.*' " (*Elliot, supra*, 37 Cal.4th
at pp. 478-479). However, the intent required for a conviction of torture (§ 206) and a
torture-murder special circumstance finding (§ 190.2(a)(18)) differs from the intent
required for a conviction of torture murder (§ 189) in that a torture-murder conviction
also requires that the defendant acted with premeditation or deliberation, and with an
intent to inflict prolonged pain. (*Pre, supra*, 117 Cal.App.4th at p. 420; *People v. Hale*
(1999) 75 Cal.App.4th 94, 107; *Aguilar, supra*, 58 Cal.App.4th at p. 1204.)

2. *Standard of review*

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318, fn. omitted.) Stated differently, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence [citation] and to special circumstance allegations [citation].'" (*Elliot, supra*, 37 Cal.4th at p. 466.)

We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

B. *Analysis*

Although Lewis testified he did not intend to torture Hasegawa, the jury did not credit his testimony. We conclude that substantial evidence amply and reasonably supports a factual finding that Lewis intended to inflict prolonged, cruel and extreme pain and suffering on Hasegawa out of revenge within the meaning of sections 189, 190.2(a)(18), and 206, and thus the evidence is sufficient to sustain Lewis's convictions

of count 1 (§§ 187(a), 189) and count 2 (§ 206), and the true finding on the count 1 torture-murder special circumstance allegation (§ 190.2(a)(18)).

First, any reasonable trier of fact could infer beyond a reasonable doubt from the *nature of Hasegawa's wounds* that Lewis acted with such intent. Chief Medical Examiner Wagner testified that Hasegawa sustained more than 100 bruises, including up to 57 bruises to the chest area alone, and the vast majority of those bruises appeared to be from new injuries inflicted on top of other new injuries. The testimony of both Dr. Wagner and the certified sexual assault examiner, Nelli, indicates Lewis inflicted injuries in areas of Hasegawa's body that would cause her to suffer extreme pain, such as her genitalia, rectum, anus, nose, lips, head, scalp, and abdomen.

Dr. Wagner opined that many of the circular bruises he observed were consistent with having been inflicted with the large flashlight found on the bed, the absence of pattern marks in the bruising to the head suggested those bruises were caused by repeated blows with a hand or foot, the excessive amount of blood he found under the scalp was consistent with multiple impacts over a period of time, the bruises down her spine were likely caused by repeated punching or kicking, and the four fresh rib fractures indicated repeated blows to her side.

Dr. Wagner also stated that Hasegawa "took a hell of a beating" and opined that her injuries were painful. Specifically, for example, he stated she would have suffered pain from the broken ribs, a broken wrist, her repeatedly-traumatized abdominal muscles, and the bruising to her lungs.

Furthermore, any reasonable trier of fact could infer from the bruising and laceration injuries to Hasegawa's genitalia, anus and rectum that those injuries caused her to suffer extreme pain and suffering.

Second, any reasonable trier of fact could infer beyond a reasonable doubt from *Lewis's own statements* that he acted out of revenge when he inflicted cruel and extreme pain and suffering on Hasegawa. The testimony of two witnesses, Jacqueline Leigh and Debbie Faremouth, shows that when Lewis showed up at Faremouth's house at around midnight on September 8, the same day he killed Hasegawa, he told them he had beaten his girlfriend and he thought he hurt her very badly. Using physical gestures, he described beating Hasegawa with his fists and told them he hit her all over her body and in the head. Lewis also told them he beat Hasegawa because she would not perform oral sex on him. Specifically, he told them that Hasegawa "wouldn't give me a blow job. For 13 years I was giving her oral sex, and she would not do this for me, for 13 years."

From this testimony, a reasonable trier of fact could infer beyond a reasonable doubt that in beating Hasegawa, Lewis was motivated by a desire to punish her in retribution for the perceived injustice of her refusal to engage in reciprocal oral sex with him.

Third, any reasonable trier of fact could infer beyond a reasonable doubt from the *circumstances surrounding the killing* that Lewis intended to torture Hasegawa. One of the neighbors testified that at around 1:30 a.m. on September 8, she heard a man and a woman arguing, and the woman screaming "Stop! No! Don't!" The yelling lasted for

about 15 to 30 minutes. A reasonable jury could infer that Lewis heard Hasegawa pleading for him to stop hurting her and thus knew he was causing her extreme pain.

Dr. Wagner opined that many of the circular bruises on Hasegawa's body were consistent with having been inflicted by the light end of the large police-type flashlight found on the bed in the apartment, and the curvilinear abrasions and lacerations to Hasegawa's vagina and rectum were also consistent with having been inflicted with the flashlight. Dr. Wagner also opined that the time of Hasegawa's death was between 8:00 and 11:00 a.m. on September 8. The cause of death was manual strangulation, and death by manual strangulation typically requires an estimated two-plus minutes of sustained pressure around the neck.

The propensity evidence of Lewis's history of sexually assaulting and physically abusing Hasegawa (discussed, *ante*) was also highly probative as to his intent to torture her.

We conclude from the foregoing evidence that a reasonable jury could infer beyond a reasonable doubt that although Lewis could have killed Hasegawa with the flashlight, he chose instead to strangle her after inflicting numerous and extremely painful nonfatal injuries over a prolonged period of time, and thus he acted with a willful, deliberate and premeditated intent to cause her to suffer extreme and prolonged pain. In sum, the evidence is overwhelming and amply sufficient to show that Lewis acted with intent to torture Hasegawa.

II. *EXCLUSION OF EXPERT FORENSIC OPINION TESTIMONY*

Next, Lewis contends his convictions and the true finding on the count 1 torture-murder special circumstance allegation must be reversed because the court prejudicially infringed upon his Fourteenth Amendment right to present a defense when it precluded two forensic experts—Dr. Wagner and Brent Turvey—from rendering opinions on whether the crime scene and the victim's condition were inconsistent with torture. This contention is unavailing.

A. *Background*

1. *Dr. Wagner*

During defense counsel's cross-examination of Dr. Wagner, the medical examiner called by the prosecution, counsel asked him, "You told me and my investigator that there are no injuries on [Hasegawa's] body that are consistent with her being tortured; correct?" The prosecutor objected to this question, stating "Absolutely improper." The court sustained the objection.

Defense counsel then asked Dr. Wagner, "Doctor, would you agree that there are no injuries on [Hasegawa] consistent with the infliction of torture?" The prosecutor again objected, stating, "It's a legal conclusion." The court sustained this objection.

2. *Brent Turvey*

During the defense case, but before Brent Turvey testified, Lewis's counsel sought permission from the court to present to the jury Turvey's opinion, as a forensic scientist and criminal profiler, whether Hasegawa's injuries and the crime scene indicated she had *not* been tortured. Specifically, defense counsel stated he wanted Turvey to testify to his

interpretation of the injuries and crime scene "in relation to what is considered sadistic infliction of pain for the purposes of pleasure, revenge, sadism." Lewis's counsel also stated, "I'm a little perplexed as to how this jury is supposed to decide the issue of torture if no one is allowed to talk about it."

The court responded, "Because the jury gets an instruction on defining what torture is. They then review the facts in the case and apply the facts to the law that I give them and make that call. That's how I've done it."

Defense counsel objected that "we're precluding our witness from commenting about the absence of evidence consistent with torture behavior." When the court asked him to give "a for-instance," Lewis's counsel stated:

"[T]here are no injuries of binding, gagging, muffling to suppress sound coming from [Hasegawa]. I think that [Turvey] should be able to talk about how in cases involving sadism or torture oftentimes a victim is gagged to prevent sound. They're restrained physically with some type of binding to keep them from moving. The fact that none of those things are present is significant."

The court replied that "[i]t would be significant if that were the exclusive means by which this jury could conclude that torture existed, but it's not . . . the exclusive method by which the jury can conclude that torture existed." The court commented, "I have yet to have a witness who, based on whatever experience, education, and qualifications, is a torture guy. I mean, I've had every kind of witness in every kind of situation. I've never heard of a torture expert." The court told defense counsel, "[U]nless you convince me otherwise, I'm going to preclude you from asking questions about this

witness's opinions on examination of the scene and of the victim and of the autopsy and concluding that it was or was not torture."

After noting it had "never heard of a torture expert in California criminal law," the court precluded the defense from presenting Turvey's opinion testimony.

B. Applicable Legal Principles

To be admissible, expert opinion testimony must be "[r]elated to a subject that is sufficiently beyond common experience [so] that the opinion . . . would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "The jury need not be wholly ignorant of the subject matter of the opinion to justify its admission." " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) Thus, " 'even if the jury has some knowledge of the matter, expert opinion may be admitted [if] it would "assist" the jury.' " (*Id.* at p. 1300.) The expert opinion testimony must be excluded only " 'when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " (*Ibid.*)

If expert opinion testimony is related to a matter sufficiently beyond common experience that the testimony would assist the trier of fact, it is admissible even if it encompasses an ultimate issue in the case. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; Evid. Code, § 805.)

However, the scope of permissible expert opinion testimony is restricted by several rules that are relevant here. First, when the expert opinion consists of inferences or conclusions that can be drawn as easily and intelligently by the trier of fact as by the

witness, the expert opinion testimony is of no assistance to the trier of fact and should be excluded. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45, 47 (*Torres*).)

Second, "the definition of a statutory term is a matter of law on which the court should instruct the jury," and expert opinion testimony on the meaning of a statute is inadmissible. (*Torres, supra*, 33 Cal.App.4th at pp. 45-46.)

Third, expert opinion testimony on the guilt or innocence of a defendant is inadmissible because the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt. (*People v. Ward* (2005) 36 Cal.4th 186, 210; *Torres, supra*, 33 Cal.App.4th at pp. 46-47.)

Last, expert opinion testimony is inadmissible on the issue of whether a crime has been committed. (*Torres, supra*, 33 Cal.App.4th at pp. 47-48.)

In reviewing a trial court's ruling on the admissibility of expert opinion testimony, we apply the abuse of discretion standard of review. (*People v. Rowland* (1992) 4 Cal.4th 238, 266.)

C. Analysis

We conclude the court did not abuse its discretion by excluding Dr. Wagner's and Turvey's opinion testimony about whether Hasegawa's injuries and the crime scene were inconsistent with an intent to torture because (1) the jury could easily draw its own inferences and conclusions with respect to the issue of Lewis's intent (see *Torres, supra*, 33 Cal.App.4th at p. 45); and (2) such testimony would have been tantamount to an impermissible opinion on the statutory definition of torture, the issue of Lewis's guilt, and the question of whether the charged crime of torture had occurred or whether the count 1

torture-murder special circumstance allegation was true. (See *People v. Ward*, *supra*, 36 Cal.4th at p. 210 & *Torres*, *supra*, 33 Cal.App.4th at pp. 45-48.)

Even if we were to assume the court erred in excluding the opinion testimony of these two experts, we would conclude that any such error was harmless under any standard. For reasons discussed, *ante*, we have already concluded the evidence from which any reasonable jury could find beyond a reasonable doubt that Lewis acted with intent to torture Hasegawa was overwhelming.

III. *IN LIMINE MOTION FOR SEPARATE JURIES*

Lewis also contends the court erred in denying his motion for separate guilt-phase and penalty-phase juries because (1) the court did not understand the scope of its discretion with respect to the motion, and (2) his defense in limine evidence from a Capital Jury Project research expert, showing that death-qualified jurors are biased toward conviction during the guilt phase of trial, constituted good cause within the meaning of section 190.4(c) (see fn. 7, *post*) for a separate, non-death-qualified jury for the guilt phase. We conclude the court erred in directing that Lewis's motion could be brought only after the guilt-phase verdict, but such error was harmless because Lewis failed to show good cause for separate juries within the meaning of section 190.4(c).

A. *Background*

1. *Lewis's pretrial motion No. 2*

In early 2007 Lewis filed his pretrial motion No. 2 seeking an order declaring the death penalty unconstitutional. In support of this motion, Lewis filed (1) voluminous

exhibits, including studies concluding that death qualified juries⁶ are more likely to convict defendants than juries that have not been death qualified; and (2) the declaration of Wanda Foglia, J.D., Ph.D., who stated that if she were to testify as an expert witness in this case, she would testify about the Capital Jury Project (CJP), which she described as a "14-state, multi-disciplinary study of how jurors decide whether or not to impose the death penalty in capital cases."

In August 2007, following a hearing on Lewis's pretrial motion No. 2 at which Dr. Foglia testified, the court issued a written ruling denying the motion. The court found that "[Lewis's] reliance on the [CJP] Study, interpretation and analysis at best only demonstrates a *potential* risk of premature decision making in death penalty cases in various states within a limited time frame and limited number of jurors interviewed. [¶] [Lewis] has not proved that inappropriate factors will, in fact, play a role in [his] case. In addition, neither the referenced study, the statistics set forth therein nor the 'interpretation' of the same by Dr. Foglia prove that the risk of inappropriate factors being considered has become constitutionally unacceptable. In other words, this Court has not been convinced there exist[] such major systemic defects that there is little or no hope for a jury making its sentencing decision in the instant case fairly and appropriately." (Italics added.)

⁶ In *People v. Davis* (2009) 46 Cal.4th 539, 625 (*Davis*), the California Supreme Court defined the term "'death qualified' juries" as "juries selected by excluding prospective jurors whose views about the death penalty make them subject to challenge for cause."

2. *Lewis's motion for separate guilt phase and penalty phase juries*

In October 2007 Lewis filed his motion for separate guilt phase and penalty phase juries, seeking an order permitting the selection of a non-death-qualified jury to judge the facts in the guilt phase of the trial in this matter. In support of his motion, Lewis relied on the prior testimony of Dr. Foglia and the CJP research concerning premature decisionmaking by death-qualified jurors sitting on capital cases, which Lewis had presented in support of his earlier motion to declare the death penalty unconstitutional (discussed, *ante*).

The court issued a tentative ruling denying without prejudice Lewis's motion for separate guilt- and penalty-phase juries. In support of its tentative ruling, the court found that the motion was "premature at this time to address that question" and stated that "the state of law on that subject in California is such that the proper process on this type of a request would be to deny without prejudice" and "permit [Lewis] to make this motion at the conclusion of the guilt phase, if there's going to be a second phase." The court also stated that "the burden then would be on the defense to show good cause," and to show good cause, "[t]here must be a showing by the defense of the inability of the guilt phase jury to perform its function."

Following oral argument by Lewis's counsel, the court confirmed its tentative ruling denying Lewis's motion without prejudice.

B. *Applicable Legal Principles*

In *Davis, supra*, 46 Cal.4th at page 626, the California Supreme Court recently explained that section 190.4(c)⁷ "expresses the Legislature's long-standing preference for a *single* jury to decide both guilt and penalty, and this preference does not violate a capital defendant's federal or state rights to due process, to an impartial jury, or to a reliable death judgment." (*Italics added.*)

Despite this legislative preference for a single jury, a trial court has the power to empanel separate juries for the various phases of a capital case "for good cause shown." (§ 190.4(c); *People v. Yeoman* (2003) 31 Cal.4th 93, 119.) In this context, "good cause" means " ' ' 'a demonstrable reality' " ' that members of the jury panel would be ' ' "[unable] to perform the functions of a juror." ' ' ' (*People v. Catlin* (2001) 26 Cal.4th 81, 114 (*Catlin*).)

Both the California Supreme Court and the United States Supreme Court "have repeatedly rejected the claim that separate juries are required because jurors who survive the jury selection process in death penalty cases are more likely to convict a defendant." (*Davis, supra*, 46 Cal.4th at p. 626, citing *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137]; *People v. Kraft* (2000) 23 Cal.4th 978, 1070; *People v.*

⁷ Section 190.4(c) provides in part: "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the *same jury* shall consider . . . the truth of any special circumstances which may be alleged, and the penalty to be applied, unless *for good cause shown* the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of *good cause* upon the record and cause them to be entered into the minutes." (*Italics added.*)

Johnson (1992) 3 Cal.4th 1183, 1212-1213; *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 68-69.)

C. Analysis

We first address Lewis's contention that his convictions must be reversed because the court, in denying his motion for separate guilt-phase and penalty-phase juries, did not understand that it had discretion to grant separate juries prior to the guilt phase. As already noted the court, in denying Lewis's motion without prejudice, found the motion was "premature" and stated "the law on that subject in California is such that the proper process on this type of a request would be to . . . permit [Lewis] to make this motion at the conclusion of the guilt phase."

In *Catlin, supra*, 26 Cal.4th 81, a capital case, the trial court denied the defendant's motion for separate juries without prejudice to renewal of the motion at the conclusion of the guilt phase of the trial. (*Id.* at p. 113.) Citing *People v. Rowland* (1992) 4 Cal.4th 238, 268, the California Supreme Court in *Catlin* held that "the trial court erred in directing that the motion could be entertained only after the guilt phase verdict" (*Catlin, supra*, at p. 114), but concluded (for reasons not pertinent here) that the error was harmless. (*Ibid.*)

Here, the record shows the court, like the trial court in *Catlin*, erroneously believed it could not consider Lewis's in limine motion for separate juries until after the guilt phase verdict. We thus conclude the court erred in directing that Lewis's motion could be brought only after the guilt phase verdict. (*Catlin, supra*, 26 Cal.4th at p. 114.)

We also conclude, however, that such error was harmless because Lewis failed to show good cause for separate juries within the meaning of section 190.4(c). Lewis contends the in limine evidence from Dr. Foglia showing that death-qualified jurors are biased toward conviction during the guilt phase of trial constituted good cause for a separate, non-death-qualified jury for the guilt phase. He asserts "the best available research shows that some percentage of people going through a death-qualification process are more prone to conviction," and "the reasonable possibility [his] guilt was judged by a jury biased toward conviction compels reversal for a new trial."

We need not analyze or discuss in detail Dr. Foglia's testimony and the voluminous exhibits Lewis presented in support of his motion. As already noted, both the California Supreme Court and the United States Supreme Court have "rejected the claim that separate juries are required [in capital cases] because jurors who survive the jury selection process in death penalty cases are more likely to convict a defendant." (*Davis, supra*, 46 Cal.4th at p. 626.) Even if we were to assume the research Lewis presented was valid, it fails to show a demonstrable reality that any of the jurors *in this case* would be unable to follow the law as set forth in the court's instructions or would refuse to listen to and weigh the evidence in an appropriate manner and is thus insufficient to constitute good cause within the meaning of section 190.4(c). (See *Catlin, supra*, 26 Cal.4th at p. 114.) In this regard, we agree with the court's finding, in denying Lewis's motion to declare the death penalty unconstitutional, that Lewis's "reliance on the [CJP] Study, interpretation and analysis at best only demonstrates a *potential* risk of

premature decision making in death penalty cases," and Lewis "has not proved that inappropriate factors will, in fact, play a role in [his] case."

IV. CLAIM OF CUMULATIVE ERROR

Last, Lewis claims the cumulative and synergistic effect of the court's errors infringed upon his Fourteenth Amendment due process right to a fair trial. This claim is unavailing.

A series of trial errors, though harmless when considered independently, may in some circumstances rise by accretion to the level of prejudicial, reversible error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

Here, the court did not commit a series of errors. Although we have concluded the court did err in denying without prejudice Lewis's in limine motion for separate juries on the ground it was premature, for reasons already discussed we have also concluded the error was harmless.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.